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VIA MESSENGER

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Official Committee of Unsecured Creditors of WorldCom, Inc., et al.
Opposition to Direct Case
Verizon Telephone Companies, Tariff FCC Nos. 1, 11, 14 and 16, Transmittal No. 226
WC Docket No. 02-317

Dear Ms. Dortch:

Enclosed please find an original and four **(4)** copies of the Opposition to Direct Case ("Opposition") filed by the Official Committee ("Committee") of Unsecured Creditors of WorldCom, Inc., et al. in the above-referenced proceeding. The Committee also has filed the Opposition electronically. Please direct any inquiries to the undersigned.

Sincerely,

Natalie G. Roisman

Enclosure

cc: Ms. Julie Saulnier

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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Verizon Telephone Companies	)	WC Docket No. 02-317
Tariff FCC Nos. 1, 11, 14, and 16 Transmittal No. 226	)	

OPPOSITION TO DIRECT CASE

The Official Committee ("Committee") of Unsecured Creditors of WorldCom, Inc. ("WorldCom"), et al., by its attorneys, respectfully submits this opposition ("Opposition") to the direct case ("Direct Case") filed by the Verizon Telephone Companies (collectively, "Verizon") in support of Verizon's proposed revisions to its above-referenced tariffs in transmittal number 226. These revisions have been suspended and designated for investigation by the Pricing Policy Division ("Division") of the Federal Communications Commission ("Commission") Wireline Competition Bureau ("Bureau") in the above-referenced proceeding.[1]

The Committee is an interested party in this proceeding. The Committee is a statutorily created committee appointed by the Office of the United States Trustee in connection with WorldCom's pending bankruptcy cases and charged with a fiduciary duty to all unsecured creditors of WorldCom. In general, the unsecured creditors' ability to receive value on the substantial debt they are owed by WorldCom is largely affected

[1] In the Matter of the Verizon Telephone Companies, Inc., Tariff FCC Nos. 1, 11, 14, and 16, WC Docket No. 02-317 (rel. Oct. 7, 2002) ("Designation Order").

by WorldCom's post-bankruptcy value as a going concern, which is, in part, dependent on the amount of WorldCom's cash flow upon its emergence from bankruptcy. Therefore, the Committee and its constituency are significantly affected by the Division's actions in the instant proceeding, because enactment of Verizon's proposed tariff revisions could result in Verizon requiring WorldCom to pay security deposits so substantial, either while in bankruptcy or upon its emergence from bankruptcy, that WorldCom's available cash flow and ability to operate profitably as a going concern would significantly decrease.

The Committee believes that WorldCom and other Verizon customers are best suited to respond to the individual arguments raised in Verizon's Direct Case. However, as a general matter, the Committee urges the Division to find that Verizon's proposed revisions are unjust, unreasonable, and discriminatory under Sections 201 and 202 of the Communications Act (the "Act") of 1934, as amended.[2] If Verizon's proposed revisions are permitted to take effect, Verizon will have the right to require security deposits equivalent to two months worth of average billing from any customer that meets one or more of six broad criteria, including filing for bankruptcy. Because Verizon is a dominant, incumbent carrier and its interstate access customers have no choice of provider other than Verizon to reach Verizon end users, absent regulatory intervention, such customers will be forced to accept Verizon's burdensome security deposit provisions. This result is unjust and unreasonable under Section 201 because it unfairly

[2] 47 **U.S.C.**§§ 201,202. Section 201 provides that "all charges, practices, classifications, and regulations for and in connection with [a] communication service shall be just and reasonable, and **any** such charge, practice, classification, or regulation that is unjust and unreasonable **is . . .** unlawful." Section 202 provides that it is "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with [a] communication service."

penalizes Verizon's interstate access customers. In addition, because Verizon's carrier customers also are, in large part, Verizon's competitors, Verizon's application of its proposed tariff revisions likely will be discriminatory under Section **202.** The Committee thus urges the Division to reject wholly Verizon's proposed tariff revisions.

At a minimum, the Committee requests that the Division find Verizon's proposed tariff revisions to be unlawful to the extent they apply to any customer that is subject to a pending bankruptcy proceeding ("Debtor Customer"). Specifically, the Division should require Verizon to revise its tariff to eliminate bankruptcy **as** a criterion for determining whether a security deposit is required. Due to WorldCom's current status as a Debtor Customer of Verizon, this issue is the primary focus of the Committee's Opposition.

I. THE PROPOSED TARIFF REVISIONS REGARDING SECURITY DEPOSITS ARE UNJUSTIFIED BY THE CURRENT STATE OF THE TELECOMMUNICATIONS INDUSTRY AND SHOULD BE REJECTED AS UNJUST, UNREASONABLE, AND DISCRIMINATORY

Verizon asserts that its proposed revisions are warranted due to the "utter crisis" in the telecommunications *industry.*[3] Specifically, Verizon argues that because it is limited as an incumbent local exchange carrier ("ILEC") in its ability to restrict service to its customers, it needs more protections than other companies against bad customer debt.[4] Although the Committee agrees that risk and uncertainty in the telecommunications market have increased in recent years, Verizon's proposed tariff revisions would not correct an alleged "current imbalance" in the access charge relationship between ILECs and competitive local exchange carriers ("CLECs").[5] Instead, the revisions would allow

[3] Direct Case at 12.

[4] Direct Case at 2.

[5] Direct Case at 15.

a dominant, incumbent carrier to insulate itself from all risk of default by its customers by unfairly exercising its market power. Verizon has proposed revisions to its tariff that are unjust, unreasonable, and discriminatory under the Act and established Commission precedent.

The proposed revisions are unjust and unreasonable because they would allow Verizon to require its customers, even customers with a lengthy history of full and timely payment, to assume virtually all of Verizon's credit risk. Verizon has argued that leaving the security deposit provisions of its existing tariffs in place will force "healthy carriers" to shoulder the burden of financially distressed carriers.[6] Therefore, according to Verizon, new practices are warranted that will protect the "healthy carriers" from risk. It is reasonable to conclude that a carrier that has a lengthy history of full and timely payment is considered to be a "healthy carrier." Nevertheless, Verizon, in an attempt to capitalize on fears stemming from the current state of the telecommunications industry, and its desire to eliminate as much of its competition as possible, has proposed tariff revisions that will cause its customers, including carriers that have never missed a payment, to unfairly assume all of the risk of default in the interstate access market.

Verizon's interstate access customers cannot seek an alternative provider if they find Verizon's security deposit policy to be overly burdensome. In the interstate access service market, a customer seeking to access Verizon end users must use and pay for Verizon interstate access service. **As** a consequence, absent regulatory intervention, such customer also must accept Verizon's security deposit policy and pay security deposits to the extent Verizon requires. **For** a customer that has always made, and continues to

[6] Direct **Case at 1.**

make, full and timely payment, but is not deemed to have satisfactory credit under the Verizon criteria, this could mean required payment of up to two months worth of average billing. This result clearly is unjust and unreasonable because it is highly likely to "place undue burdens on customers" by requiring substantial payments in excess **of** payments actually due for services rendered.' Such payments would be a particularly high burden in today's telecommunications market.

The proposed tariff revisions also have the potential to be discriminatory. Given the depressed state of the telecommunications industry, many of Verizon's customers or their parent companies are likely to have senior debt securities that arc rated below investment grade. Under the proposed tariff revisions, Verizon could demand security deposits or specified alternatives from these customers. Because many of Verizon's interstate access customers are also its competitors, the proposed tariff revisions will afford Verizon the opportunity to discriminate against and thereby disadvantage its competitors. Such result is unwarranted by the state of the telecommunications industry and violates Section **202.** The problem is made worse by the likelihood that the requirement that customers make such payments will deter potential investors and thereby decrease the possibility of new investment in such companies. Implementation of Verizon's proposed tariff revisions therefore will enable Verizon to hinder both the short-term cash flow and long-term viability of its competitor customers virtually at will.

In sum, the Division should reject Verizon's proposed tariff revisions and not allow Verizon an opportunity to exert its market power to unfairly insulate itself from any **risk** of default and hinder its competitors' growth.

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[7] **Annual** 1987 Access **Tariff Filings,** Memorandum Opinion and Order, **2** FCC Rcd 280, 304-305 (1986).

II. VERIZON'S PROPOSED TARIFF REVISIONS REGARDING SECURITY DEPOSITS ARE UNLAWFUL AS APPLIED TO DEBTOR CUSTOMERS

If the Division does not summarily reject all of Verizon's proposed tariff revisions, at a minimum, the Committee urges the Division to find that Verizon's proposed tariff revisions violate the Bankruptcy Code ("Code") and thus are unlawful as applied to any Debtor Customer. Verizon's proposed tariff modifications represent, at best, a fundamental misunderstanding of the nature and purpose of the Code, and at worst, a calculated attempt to undermine the Code and the bankruptcy court's authority in order to unfairly shift Verizon's normal business risks to its competition. The Commission should reject Verizon's proposed tariff modifications to prevent an end run around the bankruptcy process, and the damage to Verizon's Debtor Customers that would surely follow.

A. Bankruptcy is Not a Valid Predictor of the Likelihood of Whether a Customer Will Pay its Utility Bills in the Future

Verizon has argued that it should be allowed to demand a security deposit from a Debtor Customer because such customer, by filing for bankruptcy, effectively has stated "that it is unable to pay all of its future bills" and will be "unable to pay debts as they become due."[8] In fact, companies enter bankruptcy in part to ensure that they will be able to pay debts as they become due, under the direction and supervision of the bankruptcy court. In particular, with respect to utilities such as Verizon, the Code recognizes that a debtor generally may be able to provide "adequate assurance" that it can

[8] Direct Case at 8 (emphasis in original).

continue to make payments for utility services received.' Only if a debtor fails to provide adequate assurance of payment, as determined by the bankruptcy court, is a utility permitted to discontinue service to the debtor. The fact that filing for bankruptcy is not in itself a valid predictor of a customer's ability to pay its bills in the future is proven by the WorldCom bankruptcy, one of the cases cited by Verizon as a justification for the proposed tariff revisions. Specifically, upon information and belief, WorldCom, which filed for bankruptcy protection under chapter 11 on July 21,2002, is current with its post-petition payments to Verizon.[10] In sum, bankruptcy is not and cannot be considered a valid predictor of a customer's ability to pay. Therefore, the Division should not allow Verizon to use bankruptcy as a trigger to require payments of security deposits, and should require Verizon to remove bankruptcy as a criterion for evaluating whether a customer's credit is satisfactory.

B. The Proposed Tariff Revisions Usurp the Bankruptcy Court's Exclusive Authority by Allowing Verizon to Unilaterally Impose a Deposit Requirement on Debtors

In addition to drawing on invalid predictors with respect to future payments, Verizon's proposed tariff revisions constitute an inappropriate end run around the Code. First, application of Verizon's proposed security deposit provisions against a Debtor Customer would conflict with the jurisdiction of the bankruptcy court, which has the sole discretion to determine what constitutes adequate assurance of payment and to modify what amount of the deposit or security, if any, is required to provide such adequate

[9] 11 U.S.C. § *366.*

[10] Irrespective of any pre-petition amounts that may be owed by WorldCom to Verizon, which are now subject to the jurisdiction of the bankruptcy court, WorldCom's timely payment of post-petition debt underscores that the bankruptcy process and the supervision of the bankruptcy court may increase, rather than decrease, the likelihood that a carrier will make futnre payments.

assurance." Any tariff that claims to apply to chapter 11 debtors is unlawful because "section 366(b) [of the Code] vests in the bankruptcy court the exclusive responsibility for determining the appropriate security which a debtor must provide to his utilities to preclude termination of service."" Implementation of Verizon's proposed tariff revisions, which would give Verizon the right to determine unilaterally whether a Debtor Customer could make future payments, would allow Verizon to usurp the bankruptcy court's authority. This result would harm both the integrity of the bankruptcy process and the Debtor Customer. It is the role of the bankruptcy court, and not Verizon, to determine what type of adequate assurance is best in a given case.

Second, imposition of security deposits against a customer that is the subject of a bankruptcy proceeding is unnecessary, as Verizon already would be protected as a utility in a bankruptcy proceeding. Specifically, Section **366** of the Bankruptcy Code ensures that Verizon will not be subject to an unreasonable risk of nonpayment for services provided to a debtor, notwithstanding Verizon's assertions to the contrary.[13] The requirement of adequate assurance of payment contained in Section **366** does not require payment of **a** deposit, but simply means that the utility should not be subject to an unreasonable risk of nonpayment for services rendered to a debtor after the commencement of the bankruptcy case.[14] Adequate assurance is not the equivalent of a

[11] 11 U.S.C. § 366.

[12] Begley v. Philadeluhia Elec. Co. (In re Begley), 41 B.R. 402,405-406 (E.D. Pa. 1984), aff d, 760 F.2d 46 (3d Cir. 1985) (emphasis added).

[13] Direct Case at 6-8.

[14] See Virginia Elec. & Power *Co.* v. Caldor. Inc., 117 F.3d 646 (2d Cir. 1997), aff'g 199 B.R. 1,3 (S.D.N.Y. 1996); In re Adelphia Business Solutions. Inc., 280 B.R. 63, 80 (S.D.N.Y. 2002). Although Verizon's proposed tariff revisions offer "alternatives" to a cash security deposit, these alternatives are questionable with respect to a Debtor Customer. It would be extremely difficult and costly for a Debtor Customer to obtain an irrevocable letter of credit, and an advance payment requirement would be particularly burdensome to an entity attempting to reorganize under bankruptcy protection.

guaranty of payment, which is essentially what a two-month deposit would constitute.[15] Indeed, whether a utility is subject to an unreasonable risk of nonpayment can only be determined by examining the totality of the circumstances and making a "particularized inquiry into the postpetition economics of a debtor's chapter 11 case."[16] As noted in Caldor,

> In deciding what constitutes "adequate assurance" in a given case, a bankruptcy court must "focus upon the need of the utility for assurance, and to require that the debtor supply *no more than that,* since the debtor almost perforce has a conflicting need to conserve scarce financial resources. Accordingly, 'bankruptcy courts must be afforded reasonable discretion in determining what constitutes 'adequate assurance' of payment for continuing utility services.'"

It is not unusual for a bankruptcy court, after considering the particulars of a debtor's chapter 11 case, to determine that utilities are adequately assured of payment for future services without any deposits because, among other reasons, (i) the debtor's post-petition financing arrangements provide sufficient liquidity, (ii) utilities have a greater ability to monitor the financial strength of a debtor due to, among other things, the monthly operating reports a debtor is required to file, and (iii) all services provided by a utility to a debtor are entitled to administrative expense priority status pursuant to section 503(b) of the Code.[18] The proposed tariff revisions, if enacted, would override the Code and the bankruptcy court's authority by mandating exorbitant deposits in every chapter

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[15] See Caldor, 199 B.R. at 3 ("The statute does not require an 'absolute guaranty of payment.'"); Adelphia Business Solutions, 280 B.R. at 50 ("[A] bankruptcy court is not required to give a utility company the equivalent of a guaranty of payment."); In re Global Crossing Ltd., et al., Nos. 02-40187 through 02-40241, slip op. (Bankr. S.D.N.Y. March 15, 2002) (REG).

[16] See In re Adelphia Business Solutions, Inc., et al., Ch. 11 Case No. 02-11389, slip op. at 32 (Bankr. S.D.N.Y. 2002).

[17] Caldor, 117 F.3d at 650 (emphasis in original; citations omitted).

[18] See Caldor at 2; In re WorldCom Inc., et al., No. 02-13533 (AJG), slip op. at 3 (Bankr. S.D.N.Y. October 2, 2002); Adelphia Business Solutions, 280 B.R. at ___; In re Global Crossing Ltd., et al.; see also H.R. Rep., No. 95-595 at 350 (1977).

11 case, regardless of whether a bankruptcy court determined that Verizon would be adequately assured of payment for future services under Section *366* without a deposit from the customer. The proposed tariff revision that includes bankruptcy as a trigger for requiring a security deposit therefore is in conflict with bankruptcy law and should be rejected.

C. The Proposed Tariff Revisions Would Allow Verizon to Discriminate Against Debtor Customers in Violation of Bankruptcy Law

Allowing Verizon to use bankruptcy as a trigger for requiring security deposits would be inconsistent with the primary purpose of bankruptcy law, which is designed to afford a company a "breathing spell" to reorganize." Application of Verizon's proposed security deposit provisions essentially would constitute a penalty for filing for bankruptcy, which would frustrate the purpose of bankruptcy protection by saddling a company seeking to reorganize with an additional substantial expense. Moreover, the proposed tariff revisions, by their very nature, violate a basic tenet of the Code by allowing Verizon to discriminate against a debtor who files for relief under the Code. The Code specifically protects a debtor from such discrimination." Clearly, to the extent that the tariff is a contract by which both parties must abide, the imposition of a deposit requirement triggered on the filing of a bankruptcy case or the financial condition of a debtor would be discriminatory and in violation of the Code.

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[19] See, e.g., In re Ionosphere Clubs, Inc., 105 B.R. 773 (Bankr. S.D.N.Y. 1989) ("The purpose of the protection provided by Chapter 11 is to give the debtor a breathing spell, an opportunity to rehabilitate its business and to enable the debtors to generate revenue").

[20] See 11 U.S.C. § 365(e) (providing that "[n]otwithstanding a provision in an executory contract or unexpired lease, or in applicable law, any right or obligation under such contract or lease may not be terminated or modified at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on **(A)** the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a case under this title . . . .").

Further, it must be remembered that Verizon is in direct competition with many of its customers. Verizon's "additional interest as competitors, and in eliminating unwanted competition, distinguishes them from the utilities in most other section 366 disputes, where the utility would benefit from the debtor's successful reorganization . . . ."[21] Thus, by asking for approval of tariffs that would unnecessarily restrict the liquidity and the ability of a competitor customer to reorganize under the Code, Verizon actively is attempting to discriminate against temporarily financially disadvantaged customers in the hopes of eliminating unwanted competition. The Division should not allow Verizon to use its tariff for this discriminatory, anti-competitive purpose, and should not allow Verizon to use bankruptcy as a trigger for the requirement of security deposits.

[21] **Adeluhia Business Solutions, 280 B.R. at 79-SO.**

III. CONCLUSION

Based on the foregoing, Verizon should not be allowed to use its tariff to make an end run around the jurisdiction of the bankruptcy court or discriminate against its competitor customers in violation of the Code. Therefore, at a minimum, Verizon must be required to remove bankruptcy as a trigger for requiring security deposits. More importantly, the state of the telecommunications industry does not justify the unjust, unreasonable, and potentially discriminatory security deposit provisions which Verizon proposes to include in its interstate access tariff. Therefore, the Committee requests that the Division summarily reject Verizon's proposed tariff revisions.

Respectfully submitted,

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF WORLDCOM, INC., ETAL.

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